UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE: REALPAGE, INC., RENTAL SOFTWARE ANTITRUST LITIGATION (NO. II)	**Case No. 3:23-MD-3071** **MDL No. 3071** **This Document Relates to:** **3:22-cv-01082** **3:23-cv-00357** **Chief Judge Waverly D. Crenshaw, Jr.**

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO ENFORCE CLASS ACTION WAIVERS

None of Plaintiffs' arguments avoid the fact that Plaintiffs Brandon Watters and Jeffrey Weaver agreed in their leases that they would not file a class action. Watters and Weaver provide no good reason the Court should not enforce their lease agreements as written, including the class waivers. The Court should grant this motion and strike these Plaintiffs' class allegations.

I. Plaintiffs Provide No Valid Reason to Delay Addressing This Issue.

Plaintiffs' primary argument is that there are fact issues, and the Court should delay ruling until class certification.[1] But this is a strawman. Plaintiffs are no doubt correct that there are complex, individualized fact issues as to unnamed putative class members who signed their own class waivers in different states under a variety of circumstances. Mem. at 4 n.4 [Dkt. 338]. But Plaintiffs identify no fact disputes *as to Weaver and Watters* preventing enforcement of the waivers. These Plaintiffs allege they rented units from Lincoln and Camden. Their leases are undisputed and incorporated into the Multifamily FAC. *See* Mem. at 1 n.2. Weaver and Watters agreed not to file class actions; therefore, they should not be allowed to pursue class allegations and class discovery. *See* Mem. at 4 n.3.[2] The Court should enforce the terms of the waivers and reject Plaintiffs' delay request.

II. Federal Courts Regularly Enforce Class Action Waivers.

Plaintiffs gloss over the twenty-some-odd cases from around the country enforcing class waivers like those here. Mem. at 7 n.8 (collecting cases enforcing standalone class action

[1] Plaintiffs cite the Court's decision *Lammert v. Auto-Owners (Mut.) Ins. Co*., 415 F. Supp. 3d 807, 811 (M.D. Tenn. 2019), but that case is distinguishable. There, defendants moved to strike plaintiffs' class allegations to the extent they were based on a six-year limitations period. The Court denied the motion because this limitations period was not referenced in the Complaint. Here, Watters and Weaver incorporate their leases in the Multifamily FAC, and their leases state they will not file class actions.

[2] Many courts, including a court in this District, have exercised this discretion to strike class action allegations early in cases prior to discovery. *Bearden v. Honeywell Int'l Inc*., 2010 WL 1223936, at *9 (M.D. Tenn. Mar. 24, 2010); *see also* Mem. at 4, n.3 (collecting cases).

waivers).[3] Ignoring these authorities, Plaintiffs argue that there is "no federal statute or policy in favor of enforcing naked class action waiver clauses." Opp'n at 9. But plaintiffs have no federal right to file class litigation. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (explaining Rule 23 did not "establish an entitlement to class proceedings for the vindication of statutory rights"). The Supreme Court has made clear that neither the Sherman nor Clayton Acts mention class actions or suggest an intention to preclude class waivers. *Id.* at 234. Enforceability is governed by state law, and these waivers are enforceable under Tennessee and Colorado law. Mem. at 4–5.

III. Plaintiff Watters's Lease Is Enforceable Under Tennessee Law.

Plaintiffs' only contract argument is that Watters's class waiver supposedly is unconscionable. But Watters spent 18 minutes reviewing his lease and scrolled through it before signing. Ex. 1-A to Decl. of J. Stayton [Dkt. 337-1]. Watters also manifested consent by paying rent and occupying the unit according to the terms of the lease. Under Tennessee law, his lease is valid and enforceable.[4] And Plaintiffs have not shown and cannot show any procedural or substantive unconscionability under Tennessee law. *See Rubio v. Carreca Enters., Inc.*, 490 F. Supp. 3d 1277, 1289 (M.D. Tenn. 2020).[5]

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[3] Plaintiffs have no counter to Defendants' authorities other than *Martrano v. Quizno's Franchise Co.*, 2009 WL 1704469, at *21 (W.D. Pa. June 15, 2009). But the Court should disregard this outlier; a court in *Bonanno v. Quizno's Franchise Co*., 2009 WL 1068744, at *12 (D. Colo. Apr. 20, 2009) addressed this same class waiver under Colorado law and upheld it. And at least one other court has declined to follow *Martrano*. *See In re May*, 595 B.R. 894, 903 (Bankr. E.D. Ark. 2019).

[4] *See Howard-Hill v. Spence*, 2017 WL 4544599, at *7–8 (E.D. Tenn. Oct. 11, 2017) (holding unsigned leases enforceable when plaintiff manifested consent by performing and making payments conforming to their terms).

[5] Plaintiffs allege no facts evidencing unconscionability, and Tennessee law does not require fact discovery before a court can determine whether an agreement is unconscionable. *See Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 746–47 (Tenn. 2015).

Plaintiffs seek to distract the Court from applicable Tennessee law with unalleged speculation[6] about a supposed conspiracy to use the Texas Apartment Association ("TAA") and National Apartment Association ("NAA") form leases.[7] Plaintiffs cite *In re Currency Conversion Fee Antitrust Litig*., 2012 WL 401113, at *1 (S.D.N.Y. Feb. 8, 2012), which involved an alleged conspiracy to add class waivers in arbitration agreements to consumer contracts. *But see Ross v. Citigroup, Inc*., 630 F. App'x 79, 81 (2d Cir. 2015), as corrected (Nov. 24, 2015) (no conspiracy found). Plaintiffs allege nothing similar here, and their unpled conspiracy theory provides no basis to evade the class waivers.

IV. Plaintiff Weaver's Class Action Waiver Is Enforceable Under Colorado Law.

Plaintiffs insist that Plaintiff Weaver's class waiver is not enforceable, but they ignore the basic principle of Colorado law that contracts are enforceable as written. *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003); *Bonanno*, 2009 WL 1068744, at *12 (enforcing class action waiver). Plaintiffs argue that Camden's waiver does not cover the dispute at issue. But the waiver is not limited to any particular type of action. The language states that the "Resident waives any ability or right to serve as a representative party for others similarly situated or participate in a class action suit or claim against the Owner or the Owner's managing agents." *See, e.g.*, Ex. 2-A at 56 [Dkt. 337-2]. And the paragraph broadly covers all instances of "default" by owner.[8] *Id.*

Plaintiffs also argue that Camden's class waiver is unenforceable because Weaver's initial

[6] Plaintiffs, via the Dingman Declaration [Dkt. 378-1], seek to bring in facts outside of the Multifamily FAC; the Court should not consider the declaration and its attachments.

[7] Plaintiffs do not allege that the supposed conspiracy in this case included using TAA/NAA leases. Plaintiffs also ignore that Camden did *not* use the NAA lease and the language of the two waivers is different.

[8] Plaintiffs' authority confirms that the effect of a contract should "be determined primarily from the language of the agreement itself." *Draper v. DeFrenchi-Gordineer*, 282 P.3d 489, 494 (Colo. App. 2011). The broad language of the class waiver shows it is not limited to repair claims.

lease with Camden did not contain a waiver. But there is no dispute that the waiver was in Weaver's second lease with Camden, to which Weaver agreed. And no Colorado law bars a landlord from updating lease terms.[9] Plaintiffs also argue that Camden's lease is unenforceable as a contract of adhesion. Under Colorado law, the use of a standardized form among parties with unequal bargaining power does not necessarily create an unconscionable contract of adhesion. *Turner v. Chipotle Mexican Grill, Inc.*, 2018 WL 11314701, at *3 (D. Colo. Aug. 3, 2018).[10] Plaintiffs also do not—and cannot—show that Weaver could not have sought similar services elsewhere, which defeats claims of procedural unconscionability. *See Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011) (school enrollment contracts were not unconscionable contracts of adhesion, in part, because "Plaintiffs could have chosen to pursue their education elsewhere").[11]

V. Plaintiffs' Other Leases with Other Defendants are Immaterial.

Plaintiffs also try to evade their class waivers by arguing that Watters and Weaver have other leases for some part of the class period that do not contain class action waivers. Opp'n at 2–3. But this is irrelevant. Watters and Weaver are asserting claims for the entire class period—

[9] Plaintiffs also point to a June 2023 Colorado law barring class action waivers (Opp'n at 10 n.10), but that law clearly states that it is not retroactive.

[10] Plaintiffs also argue that, under Colorado law, unconscionable contracts of adhesion are all contracts that are "not bargained for, but imposed on the public for a necessary service on a take it or leave it basis." Opp'n at 10 n. 9 (citing *Bauer v. Aspen Highlands Skiing Corp.*, 788 F. Supp. 472, 474 (D. Colo. 1992)). But *Bauer* acknowledges "form contracts offered on a take it or leave it basis, alone, do not render the agreement an adhesion contract." *Bauer*, 788 F. Supp. at 474–75.

[11] The *Allstate* decision Plaintiffs cite is not instructive. In *Allstate*, the Colorado Supreme Court interpreted an insurance contract that was divided into a number of delineated coverage "Parts" with an additional section devoted exclusively to "General Provisions." *See Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo. 2002). Here, the lease at issue is in a single part, with numbered paragraphs addressing specific issues. The class waiver is found within the *only* provision of the lease addressing the tenant's rights in the event of a default by the owner. *Allstate's* analysis of a complicated, multi-part insurance contract is irrelevant.

October 18, 2018 to the present—based on all their leases with any defendant. Multifamily FAC ¶¶ 35, 38, 394 [Dkt. 314]. Plaintiffs provide no authority that would allow them to ignore their class waivers with Lincoln and Camden, simply because they entered into leases with others.

VI. Equitable Estoppel Allows All Defendants to Enforce the Class Waivers.

Contrary to Plaintiffs' unsupported argument, all Defendants can enforce the class waivers.[12] Plaintiffs insist that "[n]on-signatories under Tennessee law can only invoke equitable estoppel in situations where a signatory to the contract 'attempts to hold the nonsignatory liable pursuant to the underlying agreement.'" Opp'n at 5 (quoting *Blue Water Bay at Ctr. Hill, LLC v. Hasty*, 2017 WL 5665410, at *14 (Tenn. Ct. App. Nov. 27, 2017)). But *Blue Water Bay* only highlights why estoppel applies. The court there held estoppel applies when a signatory like Watters "raises allegations of concerted misconduct by both the nonsignatory and one or more signatories to the contract." 2017 WL 5665410, at *9. Watters alleges concerted misconduct among all Defendants. Thus, estoppel applies and all Defendants can enforce his class waiver.[13]

CONCLUSION

Defendants ask the Court to enforce the terms of Plaintiffs' leases and the class action waivers therein and strike their class allegations.

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[12] As to Weaver's lease, at this time, only Camden seeks to enforce the class action waiver. Specifically, Camden moves to bar Weaver from serving as a class representative or participating in a class action against Camden, per the terms of Weaver's lease. Other Defendants reserve the right to argue a class action bar based on the Camden lease at any class certification hearing. *Santich v. VCG Holding Corp.*, 443 P.3d 62, 65 (Colo. 2019), recognized that nonsignatories to a contract may be able to enforce its terms in certain circumstances.

[13] Because "Tennessee courts, to date, still have not addressed the 'second scenario' recognized in *Blue Water Bay*," later decisions have looked to "other courts around the country," which "have almost uniformly concluded that the plaintiff in this situation, particularly when the plaintiff alleges joint employment, is estopped from avoiding arbitration with the non-signatory." *Green v. Mission Health Communities, LLC*, 2020 WL 6702866, at *8 (M.D. Tenn. Nov. 13, 2020) (collecting cases); *see also In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 851 (D. Md. 2013); *Ordosgoitti v. Werner Enters., Inc.*, 2022 WL 874600 (D. Neb. Mar. 24, 2022).

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

DATED this 31st day of July, 2023.

/s/ *Ryan Holt*
Ryan Holt